(1)

90-1589

Supreme Court, U.S.
FILED
MAR 27 1991
OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

AKHLAQ A. CHAWLA,

Petitioner,

vs.

CHARLES McCAUSLAND, Lt. Gen., Director,
Defense Logistics Agency.

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals For the
Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

AKHLAQ A. CHAWLA
5210 South Ventura Way
Aurora, Colorado 80015
(303) 690 - 9867

Pro Se for Petitioner

QUESTION PRESENTED FOR REVIEW

Whether the United States District Court and the United States Court of Appeals erred in denying petitioner's claim of equitable tolling of the 30 day time limit as required by 42 U. S. C. S 2000e-16(c), although, both the Courts agreed that the said time limit is not a jurisdictional prerequisite, but a requirement that, like a statue of limitation, is subject to equitable tolling.

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PETITION FOR WRIT OF CERTIORARI

The petitioner Akhlaq A. Chawla respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this case on January 30, 1991.

OPINIONS BELOW

1. The opinion of the United States Court of Appeals for the Sixth Circuit is reported as Chawla v. McCausland (90-3680) and appears in the Appendix A to this petition.

2. The opinion of the United States District Court for the southern district of Ohio is reported as Chawla v. McCausland (No. C2-90-94) and appears in the Appendix B to this petition.

3. The opinion of the United States District Court for the district of Colorado is reported as Chawla v. McCausland (89-F-250) and appears in the Appendix C to this petition.

JURISDICTION

The judgment of the United States

Court of Appeals for the Sixth Circuit was entered on January 30, 1991. This Petition for Writ of Certiorari is within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. S 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section C of the 42 U. S. C. S 2000e-16 which is set forth in Appendix E of this petition.

STATEMENT OF THE CASE

Petitioner, Pro se, Akhlaq A. Chawla received Notice of Final Agency Decision (dated: January 12, 1989) on January 17, 1989 (Appendix D to this petition).

On February 13, 1989 (27th day following the receipt of agency's final decision), the petitioner instituted a

civil action against the Agency and filed a Complaint in the United States District Court for the district of Colorado believing in GOOD FAITH that the Venue was proper in that Court.

On April 27, 1989, the respondent had filed a motion to dismiss complaining that the venue was not proper in the District Court for the district of Colorado.

On May 12, 1989, the petitioner moved a 'Motion to Transfer' the case in the United States District Court for the Eastern District of Missouri, where the Venue was proper. (See Appendix F for a copy of motion to transfer.)

On May 15, 1989, the District Court for the District of Colorado dismissed the petitioner's civil action without

prejudice saying that the 'Parties Disagree as to Whether Venue was Proper in Missouri or Ohio'. (See Appendix C for a copy of the Court Order.)

Pursuant to F.R.C.P. Rule 41(b), dismissal without prejudice did not operate as an adjudication upon merits. Meeting the requirements of F.R.C.P. Rule 15(c), which states in part:

> *"Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the original pleading."*

The petitioner filed an 'Amended Complaint' in the United States District Court for the Southern District of Ohio on January 25, 1990 (about 8 months and 10 days following the dismissal without prejudice from the District Court of Colorado).

On June 22, 1990, the United States District Court for the Southern District of Ohio agreed that the 30 day time limit as required by 42 U. S. C. S 2000e-16(c) was not jurisdictional. At the same time, the Court dismissed the petitioner's 'Amended Complaint' denying equitable tolling of the 30 day time limit. (See Appendix B for a copy of the Court Order.)

By order dated January 30, 1991, the United States Court of Appeals for the Sixth Circuit dismissed the petitioner's Appeal without acknowledging:

i) the fact that the petitioner, pro se, had instituted the civil action in the United States District Court for the district of Colorado within 30 day time limit, as required by 42 U. S. C. S 2000e-16(c), and

ii) the petitioner's 'Reply Brief of Appellant', which included arguments for entitlement to equitable tolling.
(See Appendix A for a copy of the order from the Court of Appeals for the Sixth Circuit and Appendix G for a copy of 'Reply Brief of Appellant'.)

REASONS FOR GRANTING THE WRIT

The Certiorari in this case should be granted for the following reasons:

A. The Notice of Final Agency Decision (Appendix D to this petition) stated in paragraph No. 5:

"In lieu of an appeal to the office of review and appeal, EEOC, you may file a civil action in an appropriate United States District Court..."

The Agency did not clearly instruct petitioner (pro se) specific information pertaining to United States District Court

of Proper Venue.

B. The United States District Court for the District of Colorado erred in denying petitioner's 'Motion to Transfer' the case to United States District Court for the Southern district of Missouri, where the Venue was proper. In *Jacobson v. Indianapolis Power and Light Company*, 16 3 F. Supp 218 (DC Ind.), 1958, the Indiana District Court ruled:

"*In granting transfer to cases under 28 USC 1406(a) weight can be given to fact that Plaintiff brought his action in mistaken belief that venue is proper.*"

In *Burnett v. New York C. R. Company*, 380 US 424, 1965, the United States Supreme Court held that:

"*When dismissal of action for improper venue will terminate rights without hearing on merits because plaintiff's action will be barred by statue of limitations, interest of justice requires that the case be transferred.*"

C. The majority of the Circuit Courts agree to the fact that the 30 day time limit as required by the 42 U. S. C. S 2000e-16(c) is not jurisdictional and is subject to equitable tolling. Both the Court of Appeals for the Sixth Circuit and the District Court for the Southern District of Ohio agreed to the aforementioned fact, but, erred in denying equitable tolling to the petitioner's case.

Opinions of Circuit Courts, as recorded in the following cases, vehemently support entitlement of equitable tolling to the petitioner's case:

i) In Martinez v. Orr, 738 F.2d 1107 (10th Circuit 1984), on August 12, 1981, Martinez received a notice informing him of the EEOC final decision and of his right to file a civil action.

On August 27, 1981, Martinez requested reconsideration, which was denied by EEOC on May 24, 1982.

On June 16, 1982 (about 10 months and 5 days after Martinez received EEOC final decision giving him right to file a civil action), Martinez filed civil action. The 10th Circuit held that:

> *"Unlike district court, however, we are persuaded that under the circumstances of this case , equitable considerations require that Martinez be allowed to proceed with his claim." (Martinez Page 1109)*

The 10th Circuit continued:

> *"We refuse to hold that in seeking to pursue all administrative avenues before resorting to litigation Martinez thereby waived his right to sue, when nothing on the face of the notice he received explicitly foretold such a result." (Martinez Page 1112)*

ii) In Warren v. Department of Army, 867 F.2d 1156 (8th Circuit, 1989), on May 5, 1987, Warren received a

copy of the EEOC final decision along with notice of right to file civil action.

On May 29, 1987, filing of civil action by Warren was recorded in the district court.

The United States Attorney was not served until July 9, 1987, i.e., 35 days after the thirty days time period had expired.

The District Court had dismissed Warren's complaint with prejudice, because Warren had failed to name proper defendant, i.e., 'the Secretary of the Army' and that an Amended Complaint per Rule 15(c) was not permissible. The 8th Circuit held that:

"We see no reason to distinguish section 2000e-5(f)(1) from section 2000e-16(c) for purpose of equitable tolling." (Warren Page 1159)

Quoting Mondy v. Secretary of

the Army, 845 F.2d 1052 (D.C. Circuit 1988); *Paulk v. Department of the Air Force, Chanute Air Force Base*, 830 F.2d 70, 80 (7th Circuit 1987); and *Williams v. Army and Air Force Exchange Service*, 830 F.2d 27, 31 (3rd Circuit 1987), the 8th Circuit agreed that:

> *"It would be a simple matter to provide in the right to sue letter [clear] information as to who should be named as defendant." (Warren Page 1160)*

The circuit court allowed equity toll the running of the period against Warren and permitted him amendment to his complaint substituting the Secretary of the Army for the Department of the Army allowing application of F.R.C.P. Rule 15(c).

iii) In *Washington v. Ball*, 890 F.2d 413 (11th Circuit 1989), Washington received his Agency's final notice on August 26, 1988. Washington

filed instant complaint in the D.C. District Court (where the Venue was not Proper) on October 25, 1988 (i.e., 60 days after Washington received his right to sue letter).

The D.C. District Court transferred the case to District Court for the Middle District of Georgia, where the Venue was Proper. The Georgia District Court dismissed the case granting the Secretary's motion to dismiss pursuant to 42 U. S. C. S 2000e-16. The 11th Circuit held that:

> *"Compliance with the 30 day time limit, however, is not a prerequisite to the district court's jurisdiction; the thirty day limit is similar to a statue of limitation and is subject to a equitable tolling." (Washington Page 414)*

Quoting Manning v. Carlin, 786 F.2d 1108, 1109 (11th Circuit 1986), the 11th Circuit held that:

"Just as the statue is tolled where a plaintiff is mislead by the Secretary, the statue should be tolled when a plaintiff is mislead by the court." (Washington Page 415)

CONCLUSION

For the reasons set forth above, a writ of certiorari should be granted to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

_____

AKHLAQ A. CHAWLA
Pro se for Petitioner

Dated:

APPENDIX

APPENDIX A

No. 90-3680

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AKHLAQ A. CHAWLA,	)	Filed
	)	Jan. 30, 1991
Plaintiff- Appellant,	)	
v.		
CHARLES McCAUSLAND,	)	LEONARD GREEN
LT. GN. Director,	)	Clerk
Defense Logistics	)	
Agency,	)	O R D E R
	)	
Defendant-Appellee	)	

BEFORE: GUY AND BOGGS, Circuit judges; and LIVELY, Senior Circuit Judge.

This pro se plaintiff appeals the district court's order dismissing his employment discrimination action as untimely. The appeal has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. The panel unanimously agrees that oral argument is not necessary. Fed. R. App. 34(a).

Akhlaq Chawla sought reinstatement, back pay, monetary damages and other

relief in this employment discrimination suit filed under Title VII, 42 U.S.C. S 2000-16(c). He alleged that defendant employer discriminated against him on the basis of religion and national origin. Chawla first pursued administrative remedies. He received a "Notice of final Agency Decision" on January 17, 1989, advising him of his right to file a civil action "in an appropriate U. S. District Court within 30 days of receipt of the final agency decision."

Upon review, we conclude that the district court properly dismissed the complaint as untimely. The statue provides that a plaintiff may bring a civil action within thirty days of receipt of a notice of final agency decision. 42 U. S. C. S 2000e.16(c). Chawla received the notice on January 17, 1989. He did not file his complaint in the U.S. District Court for the Southern District of Ohio

until January 25, 1990, more than one year later. Moreover, Chawla was not entitle to equitable tolling of the time limit. While the concept of equitable tolling may be applied to filing requirements in Title VII cases, Chawla did not demonstrate that he was entitled to such relief. Chawla's remaining arguments lack merit.

Accordingly, the district court's judgment is hereby affirmed. Rule 9(b)(5), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED...
Jun 22 ... '90

AKHLAQ A. CHAWLA
Plaintiff

Civil Action
No. C-2-90-0094

vs.

LT. GEN. CHARLES McCAUSLAND,
DIRECTOR, DEFENSE LOGISTICS
AGENCY
Defendant

ORDER

Plaintiff Akhlaq A. Chawla brings this action under 42 U.S.C. S 2000e-16(c) alleging employment discrimination based upon his national origin (Pakistan) and religion (Islam) by his former employer, The Defense Logistics Agency and the Defense Construction and supply Center. This matter is before the court on defendant's motion to dismiss.

It is undisputed that plaintiff received copy of his Agency's final decision denying his claim of employment

discrimination and notifying him of his right to institute a civil action within 30 days on January 17, 1989. Plaintiff did initiate a civil action within 30 days; however, he filed that suit in the United States District Court for the District of Colorado. On May 15, 1989 that court dismissed the suit without prejudice. The Court denied plaintiff's motion to transfer the case. The complaint herein was not filed until January 25, 1990.

There is 30 day statute of limitation under 42 U.S.C. S 2000e-16(c). Although the limitation period is not jurisdictional, Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982), plaintiff has set forth no facts which would permit equitable tolling of limitation period. cf Martinez v. Orr, 738 F.2d 1107, 1109 (10th Cir. 1984). Since this suit was not filed within 30 days of plaintiff receiving notice of the Agency's final decision and

was filed more than 200 days after the United States District Court of the District of Colorado dismissed the complaint he filed there, the Court HOLDS that this suit is barred by 42 U.S.C. S 2000e-16(c).

Defendant's April 12, 1990 motion to dismiss is GRANTED. This action is hereby DISMISSED. The Clerk of the Court is DIRECTED to enter JUDGMENT for defendant.

George C. Smith, Judge
United States District Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

AKHLAQ A. CHAWLA,

Plaintiff

vs.

LT. GEN CHARLES McCAUSLAND, DIRECTOR, DEFENSE LOGISTICS AGENCY,

Defendant.

Filed ...
May 15, 1989

ORDER

This matter comes before the court on defendant's motion to dismiss, and plaintiff's motion to transfer. On April 27, 1989, defendant moved to dismiss this case for improper venue. By order of the court on April 27, 1989, plaintiff was directed to respond on or before May 12, 1989. To date, no response has been received. Instead, plaintiff moved to transfer this case to the Eastern District of Missouri. The parties disagree as to whether venue is proper in Missouri or

Ohio.

Accordingly, plaintiff's motion to transfer is DENIED. Defendant's motion to dismiss is GRANTED, and this case is dismissed without prejudice.

Done this 15 day of May, 1989 at denver, Colorado.

By the Court:

Sherman G. Finesilver, Chief Judge
United States District Court

APPENDIX D

DEFENSE LOGISTICS AGENCY
DEFENSE CONSTRUCTION AND SUPPLY CENTER
POST OFFICE BOX 3990
COLUMBUS, OHIO 43216-5000

In reply
refer to DCSC-DC 12 JAN 1989

SUBJECT: Notice of Final Agency decision
Akhlaq A. Chawla - CA-88-016

To: Mr. Akhlaq A. Chawla
2231 S. Vaughn Way, Unit 114-B
Aurora, Colorado 80014

1. On 13 December 1988 you were given a Notice of Proposed Disposition of Discrimination Complaint. That letter proposed a finding of no discrimination be made in your case. Your were given fifteen (15) days in which to reply if you were dissatisfied with the proposed disposition of your complaint. We have not received a response to our letter.

2. This is to notify you of the adoption of the proposed disposition of no discrimination dated 13 December 1988 as the Final Agency Decision in your case. If you

are not satisfied with this decision, you have the following appeal rights.

3. Your may file an appeal with the Director, Office of Review and Appeals, Equal Employment Opportunity Commission (EEOC), 5203 Leesburg Pike, Suite 900, Falls Church, Virginia 22041. A copy of your statement or brief in support of your appeal must also be submitted to the Director of Equal Employment Opportunity, ATTN: DLA-KE, Cameron Station, Alexandria, Virginia 22314. An appeal to the EEOC must be submitted within the time limits specified by Title 29 of the Code of Federal Regulations, Section 1613.233, which states the following:

"(a) Except as provided in paragraph (b) of this section, a complainant may file a notice of appeal at any time up to 20 days after receipt of the agency's notice of final decision on his or her complaint. An appeal shall be deemed filed on the date it is postmarked, or in the absence of a postmark, on the date it is received by the commission. Any statement or brief in support of the appeal must be submitted to the commission and to the defendant

agency within 30 calendar days of filing the notice of appeal. For purposed of this part, the decision of an agency shall be final only when the agency makes a determination of all of the issues in the complaint, including whether or not to award attorney's fees or costs. If a determination to award attorney's fees or costs is made, the decision will not be final until the procedure is followed for determining the amount of the award as set forth in (Section) 1613.271 (c)."

****

"(c) The 20-days time limit within which a notice of appeal must be filed will not be extended by the Commission unless, based upon written statement by the complainant showing that he or she was not notified of the prescribed time limit and was not otherwise aware of it or that circumstances beyond his or her control prevented the filing of Notice of Appeal within the prescribed time limit, the commission exercises its discretion to extend the time limit and accept the Appeal."

4. If you elect to appeal to the office of Review and Appeals, EEOC, you may file a civil action in a U.S. District Court within 30 days of receipt of the EEOC final decision.

5. In lieu of an appeal to the Office of Review and Appeals, EEOC, you may file a

civil action in an appropriate U. S. District Court within 30 days of receipt of the final agency decision.

6. A civil action may also be filed any time after 180 days of the date of initial appeal to EEOC if a final decision has not been rendered.

7. If you file a civil action, and you do not have an attorney or are unable to obtain one, the U. S. District Court may, in its discretion, appoint counsel to represent you upon your request for appointment of counsel.

JAMES J. MILLER
Colonel, USAF
Chief of Staff

1 Encl

cc: DLA-KE

APPENDIX E

42 U. S. C. S 2000e-16(c) requires that:

"Within thirty days of receipt of notice of final action taken by a department, agency or unit... on a complaint of discrimination based on race, color, religion, sex or national origin... an employee...if aggrieved by the final disposition of his complaint,... may file a civil action as provided in section 2000e-5 of this title....

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 89-F-250 Filed...
89 May 12...

AKHLAQ A. CHAWLA,

PLAINTIFF,

V.

LT. GEN. CHARLES McCAUSLAND,
DIRECTOR, DEFENSE LOGISTICS
AGENCY,

DEFENDANT.

MOTION TO TRANSFER

Plaintiff states as under in support of Motion to Transfer:

1. It has been more than 400 days since the Plaintiff was separated from United States Government Employment.

2. Pursuant to Federal Personnel Manual Chapter 296 Subchapter 33, Official Personnel Folders are required to be transferred to 'National Records Center, St. Louis, Missouri, 90 to 120 days after

termination of federal employment.

3. Pursuant to Provisions of U.S.C. 2000e-f(5)(3) Venue in the above captioned case is Proper in the U. S. District Court of St. Louis, Missouri.

Wherefore, based on the facts stated above , pursuant to applicable federal rules of civil procedures , to transfer this case to U. S. District Court St. Louis, Missouri, and to grant such other relief as to the court seems just and proper.

Respectfully Submitted

(AKHLAQ A. CHAWLA)
Plaintiff,

Dated: 12th May, 1989.

5210 S. Ventura Way
Aurora, Colorado 80015

APPENDIX G

UNITED STATES COURTS OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 90-3680

AKHLAQ A. CHAWLA

Plaintiff - Appellant

V.

CHARLES McCAUSLAND, Lt. Gen., Director, Defense Logistics Agency

Defendant - Appellee

REPLY BRIEF OF APPELLANT, PRO SE

AKHLAQ A. CHAWLA
PLAINTIFF - APPELLANT
(PRO SE)

5210 S. VENTURA WAY
AURORA, COLORADO 80015
Telephone: (303) 690-9867

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REPLY STATEMENT OF ISSUE

i) THE DEFENSE LOGISTICS AGENCY'S DEFENSE CONSTRUCTION AND SUPPLY CENTER, WHILE ISSUING RIGHT TO SUE LETTER TO APPELLANT, FAILED TO INCLUDE INFORMATION PERTAINING TO U. S. DISTRICT COURTS OF PROPER VENUE

ii) THE U. S. DISTRICT COURT FOR THE DISTRICT OF COLORADO ERRED IN DENYING APPELLANT'S 'MOTION TO TRANSFER' TO A DISTRICT OF PROPER VENUE AND DISMISSING THE APPELLANT'S COMPLAINT

iii) THE U. S. DISTRICT COURT FOR THE 0 SOUTHERN DISTRICT OF OHIO DID NOT ERR IN HOLDING THAT THE 30 DAY PERIOD AS REQUIRED BY 42 U.S.C. 2000e-16(c) was non-jurisdictional

iv) THE U. S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO ERRED IN DISMISSING THE APPELLANT'S AMENDED COMPLAINT WITHOUT DETERMINING AND APPLYING

EQUITABLE TOLLING OF THE OF 30 DAY TIME LIMIT AS REQUIRED BY 42 U.S.C. 2000e-16(c)

REPLY STATEMENT OF THE FACT

This case comes before this court of Appeals for review of equitable tolling of 30 day time period as required by 42 U.S.C. 2000e-16(c) as set forth in the COURSE OF PROCEEDINGS AND ARGUMENTS BELOW.

REPLY STATEMENT OF THE CASE

Course and Disposition of Proceedings

AKHLAQ A. CHAWLA, Plaintiff-Appellant, Pro Se, started working with U. S. Government since March 25, 1985, and the Appellánt was a resident of State of Colorado since 1981. The Appellant worked at U.S. ARMY, Tooele Army Depot, Tooele, Utah, as a 'Career Conditional', Mechanical Engineer, GS-830-11 (Target GS-830-12) from March 25, 1985 to April 11,1987, which included initial probationary period, i.e., from March 25,

1985 to March 24, 1986. The Appellant had 'Competitive Status' beginning March 25, 1986 and was eligible for 'Non-Competitive' promotion to Grade GS-830-12.

Effective from April 12, 1987, Appellant's services were 'Transferred' from 'Tooele Army Depot' to Defense Logistics Agency's (DLA) Defense Construction and Supply Center (DCSC), Columbus, Ohio, with a grade promotion, i.e., Mechanical Engineer, GS-830-12.

Appellee, discriminating on the basis of Appellant's National Origin, i.e., PAKISTAN and Appellant's Religion, i.e., Islam,y required Appellant to complete 'An Additional Year Of Probationary Period' beginning April 12, 1987. Requiring to complete an additional year of probationary period from a 'TRANSFEREE' is a violation of Federal Personal Manual (FPM) Chapter 315, Subchapter 8-2(e) which states in part:

"The employee does not have to serve a new probationary period after position change or transfer, regardless of a change in his line of work".

On March 25, 1988, (After 11 1/2 month s service) Appellee, discriminating Appellant on the basis of his National Origin (PAKISTAN)and his Religion (ISLAM), terminated Appellant's services with U. S. Government, treating Appellant as a 'Probationer' rather than a 'Competitive Status'(or Permanent) employee (Note: Appellant had 'Competitive Status' since March 25, 1986.)

Following exhaustion of EEO and Administrative proceedings on Appellant's Complaint on aforementioned basis, DCSC issued 'Final Decision' on January 12, 1989 (received by Appellant on January 17, 1989).

On February 13, 1989 (27th day following the receipt of 'agency's final decision'), Appellant, Pro Se, complying

the 30 day time limit, instituted a civil action in the U.S. District Court for the District of Colorado believing in 'GOOD FAITH' that the 'VENUE' was proper in the Court for the District of Colorado.

Appellant alleged discrimination on aforementioned basis, prohibited by Title VII of the Civil Rights Acts of 1964, as amended, 42 U.S.C. 2000e-16, et. seq. and 42 U.S.C. S 1981, "Equal Rights under the Law".

On April 27, 1989, Appellee, filed a motion to dismiss complaining that venue was not proper in the district court for the district of Colorado and that venue was proper in the district court for the southern district of Ohio.

Knowing that pursuant to requirements of 42 U.S.C. 2000e-5(f)(3), VENUE was proper in two (2) judicial districts, i.e., i) Eastern District of Missouri, where employment records relevant to

unlawful employment practice had been maintained, [Note: According to FPM Chapter 296-31, Official Personnel Folders are transferred to 'National Personnel Record Center, St. Louis, Missouri, 90 to 120 days after termination of Federal Employment. About 439 days from the date of termination and about 144 days from the date of receiving final agency's notice had elapsed at the time of filing of the 'Motion to Transfer'.]

ii) Southern District of Ohio, where the alleged unlawful employment practice had been committed,

Appellant on May 12, 1989, moved a 'Motion to Transfer in the court for the district of Colorado requesting to 'Transfer' the action to the court for the Eastern District of Missouri, where the 'National Personnel Record Center' was located and the 'VENUE' was proper.

On May 15, 1989, the court for the

District of Colorado recorded Appellee's motion to dismiss and Appellant's Motion to Transfer the action to Eastern District of Missouri (i.e., District of Proper Venue). The court ordered to grant the Appellee's motion to dismiss and denied Appellant's Motion to Transfer. The court dismissed the Appellant's action without prejudice saying that "the parties disagree as to whether venue is proper in Missouri or Ohio". The U.S. District Court for the District of of Colorado's Order dated May 15, 1989 (received by Appellant on May 1989), failed to inform Appellant (Pro Se) legal avenues available to further pursue his rights.

Receiving the dismissal order, dated May 15, 1989 (received by Appellant on May 19, 1989), from the Court for the District of Colorado, Appellant (Pro Se) decided to amend the Original Complaint and to instituting the action in a district of

proper venue. Accordingly, Appellant started amending the complaint.

From July 27, 1989 to November 30, 1989, Appellant was working in state of Missouri on a temporary job and was unable to work on amended complaint (Note: Appellant was unemployed since March 25, 1988).

Appellant returned to home (Colorado) on December 2, 1989, studied Federal Personnel Manual (i.e., U. S. Government Employment Law), amended the complaint, and mailed the 'Amended Complaint' to the U. S. District Court for the Southern District of Ohio on January 19, 1990 (the Court received the Amended Complaint on January 26, 1990).

On April 12, 1990, Appellee moved a motion to dismiss claiming that, pursuant to F.R.C.P. Rule 12(b)(6), Appellant failed to state a claim on which relief could be granted. On April 26, 1990, Appellant, Pro Se, filed 'Answer to Motion

to Dismiss', stressing that F.R.C.P. Rule 12(b)(6) was not applicable to the action and that 30 day time limit required by 42 USC S 2000e-16(c) was not jurisdictional and was subject to waiver, estoppel, and equitable tolling.

On June 22, 1990, U. S. District Court for the Southern District of Ohio dismissed the Appellant's Amended Complaint. Although the Court Agreed that the 30 day statue of limitation under 42 USC S 2000e-16(c) was not jurisdictional, the Court failed to determine facts which would permit equitable tolling of the limitation period. It is this order Appellant has appealed.

REPLY ARGUMENTS

i) THE DEFENSE LOGISTICS AGENCY'S DEFENSE CONSTRUCTION AND SUPPLY CENTER, WHILE ISSUING RIGHT TO SUE LETTER TO APPELLANT, FAILED TO INCLUDE INFORMATION PERTAINING TO U. S. DISTRICT COURTS OF PROPER VENUE

The Agency's 'Notice of Final

Decision' dated January 12, 1989 (Received by Appellant on January 17, 1989), stated in paragraph No. 5:

"In lieu of an appeal to the office of Review and Appeal, EEOC, you may fie a civil action in an appropriate U. S. District Court within 30 days of receipt of the final agency decision."

Obviously, Appellee failed to inform Appellant (Pro Se) information pertaining to U. S. District Courts of proper venue along with their addresses.

(Note: The Agency did provide the name of the Defendant and the address of the 'Review and Appeals', EEOC.)

ii) THE U. S. DISTRICT COURT FOR THE DISTRICT OF COLORADO ERRED IN DENYING APPELLANT'S 'MOTION TO TRANSFER' TO A DISTRICT OF PROPER VENUE AND DISMISSING THE APPELLANT'S COMPLAINT

The denial of the court for the district of Colorado in granting Appellant's (Pro Se) Motion to Transfer the action to the district of proper venue, reasoning that the Appellee disapproved or disagreed Appellant's

Motion to transfer, was not interest of justice at all. In Jacobson v. Indianapolis Power and Light Company, 163 F. Supp 218 (DC IND), 1958, the Indiana District Court ruled that:

"In granting transfer to cases under 28 USC S 1406(a) weight can be given to fact that Plaintiff brought his action in mistaken belief that venue is proper."

In Burnett v. New York C. R. Company, 380 US 424, 1965, the United States Supreme Court held that:

"When dismissal of action for improper venue will terminate rights without hearing on merits because Plaintiff's action will be barred by statue of limitations, interest of justice requires that the case be transferred."

iii) THE U. S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO DID NOT ERR IN HOLDING THAT THE 30 DAY PERIOD AS REQUIRED BY 42 U.S.C. 2000e-16(c) WAS NO-JURISDICTIONAL

In Washington v. Ball, 890 F.2d 413 (11th Cir. 1989), the 11th Circuit held that:

"Title 42 U.S.C. S 2000e-16 requires that civil action brought by federal

employee against the United States for alleged violations of Title VII must be commenced within thirty days of the employee's receipt of notice of final agency action, 42 U.S.C. S 2000e-16(c). Compliance with the thirty day time limit, however, is not a prerequisite to the district court's jurisdiction; the thirty day limitation is subject to equitable tolling. Bates v. Tennessee Valley Authority, 851 F.2d 1366, 1368 (11th Cir. 1988)." (Washington Page 414)

In Warren v. Department of Army, 867 F.2d 1156 (8th Cir. 1989), the 8th Circuit held that:

"[T]he filing period is analogous to a statue of limitations in that it is subject to equitable modification. The Supreme Court has held that the statutory time provision for filing with the EEOC a Title VII claim against a private employer is not a jurisdictional requisite to suit federal court, but is instead subject to waiver, estoppel, and equitable tolling. Zipes v. Trans World Air Lines, 455 U. S. 385, 393, 102 S.Ct. 1127,1132, 71 L.ED.2d 234 (1982). Zipes did not indicate, however, whether this holding extended to section 2000e-16(c) suits filed in federal court against the government. While this court until today reserved judgement on the issue, see James v. United States Postal Service, 835 F.2d 1265 & n.2 (8th cir. 1988), we now follow the prevailing view and extend the reasoning Zipes to hold that, even in suits against the government, the thirty-day filing period established by section 2000e-16(c) is not jurisdictional but

instead is subject to equitable tolling. See Mondy v. Secretary of the Army, 845 F.2d 1051, 1054-57 (D.C. Cir. 1988) (analyzing statutory language and structure to conclude that limits of section 2000e-16(c) are not jurisdictional). We have previously indicated that because of the remedial character of Title VII, the filing of 42 U.S.C. s 2000e-5(f)(1) is more akin to a statue of limitations than a jurisdictional prerequisite. See Thomas v. KATV Channel 7, 692 F.2d 548, 549-50 & n.2 (8th Cir. 1982) (per curiam), cert. denied, 460 U.S. 1039, 103 S.Ct. 1431, 75 L.ED.2d 790 (1983). We see no reason to distinguish section 2000e-5(f)(1) from section 2000e-16(c) for purpose of equitable tolling. See Martinez v. Orr, 738 F.2d 1107, 1110 (10th Cir. 1984)." (Warren Page 1159)

iv) THE U. S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO ERRED IN DISMISSING THE APPELLANT'S AMENDED COMPLAINT WITHOUT DETERMINING AND APPLYING EQUITABLE TOLLING OF THE OF 30 DAY TIME LIMIT AS REQUIRED BY 42 U.S.C. 2000e-16(c)

In Martinez v. Orr, 738 F.2d 1107 (10th Cir. 1984), On August 12, 1981, Martinez received a notice informing him of the EEOC decision and of his right to file a civil action. On August 27, 1981, Martinez requested reconsideration, which was denied on May 24, 1982. On June

1982 (about 10 months after he received his right to file a civil action) Martinez filed civil action. The 10th Circuit held that:

"Unlike the district court, however, we are persuaded that under the circumstances of this case, equitable considerations require that Martinez be allowed to proceed with his claim." (Martinez Page 1109)

"Although suits by federal employees are governed by the shorter thirty-day limitations period contained in 42 U.S.C. S 2000e-16(c), we perceive no substantial reason why this section should be treated any differently from section 2000e-5(f)(1) for purpose of equitable tolling. The legislative history of the amendment indicates that in extending the coverage of the Title VII federal employees, Congress intended to give them essentially the same rights and remedies as had been provided employees in the private sector. See id. at 2157-60; Parks v. Dunlop, 517 F.2d 785 (5th Cir. 1975); Douglas v. Hampton, 512 F.2d 976, 981 (D.C. Cir. 1975). In view of the principle that Title VII 'is a remedial statue to be liberally construed in favor of victim of discrimination', Davis v. Valley Distribution Co., 522 F.2d 827, 832 (9th Cir. 1975), Cert. denied, 429 U.S. 1090, 97 S.Ct. 1099, 51 L.ED.2d 535 (1977), we conclude that the thirty-day time limitation of section 2000e-16(c) is not jurisdictional and may be subject to equitable tolling in appropriate cases. For instance, equitable tolling may be

appropriate where a plaintiff has been 'lulled into inaction by her past employer, state or federal agencies, or her courts'. Carlile v. South Routt School District RE 3-J, 652 F.2d 981, 986 (10th Cir. 1981); see Gonzalez-Aller Balseyro, 702 F.2d at 858. Likewise, if a plaintiff is 'actively misled', or 'has been some extraordinary ways been prevented from asserting his or her rights,' we will permit tolling of limitations period. Wilkerson v. Siegfried Insurance Agency, inc. 683 F.2d 344, 348 (10th Cir. 1982); see also Cottrell, 590 F.2d at 838." (Martinez Page 1110)

TOLLING DETERMINATION

a) The Agency while issuing right to sue letter did not inform Appellant (Pro se) regarding U. S. District Courts where the venue would be proper.

b) Appellant filed original complaint in U. S. District Court for the District of Colorado in a mistaken belief that the venue was proper.

c) The U. S. District Court for the District of Colorado was not justified in denying Appellant's (Pro se) Motion to Transfer to U. S. District Court for the

Eastern District of Missouri, where the venue was proper.

d) The court for the district of0 Colorado did not inform Appellant (Pro se) of any time limit for second filing of the complaint in a district where the venue would have been proper.

e) The Appellant (Pro se) amended the original complaint pursuant to requirement of F.R.C.P. 15(c), which states in part:

> "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates to the original pleading."

f) The 'Amended Complaint' was sent by mail to the Clerk, U. S. District Court for the Southern District of Ohio, on January 19, 1990 and was received by the Clerk on January 26, 1990.

g) At time of first filing at the court for the district of Colorado,

Appellant (Pro se) was wholly unfamiliar of 'Federal Personnel Manual (Federal Government Personnel Law)' and the Law governing federal courts. It was during preparation of 'Amended complaint, Appellant (Pro se) gained some familiarity of 'Federal Personnel Manual'(FPM). And during preparation of 'Answer to Motion to Dismiss', dated April 23, 1990, the Appellant learned how to use a Law Library and gained some familiarity of Title VII law.

h) In view of facts and circumstances mentioned above, time period form May 19, 1989 to January 26, 1990, be tolled.

REPLY CONCLUSION

For the aforementioned reply arguments and facts, the Appellant (Pro se) request the honorable court to reverse the order entered by the U. S. District Court for the Southern District

of Ohio against Appellant.

Respectfully submitted,

(AKHLAQ A. CHAWLA)
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CERTIFICATE OF SERVICE

PLAINTIFF - APPELLANT, PRO SE, hereby certify that on ____ day of October, 1990, a copy of 'Reply Brief of Appellant was mailed postage paid to:

D. Michael Crites
U. S. Attorney
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